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Misconduct in a Public Office— Should It Still Be Prosecuted?

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Abstract This article examines the common law crime of misconduct in a public office from its ancient origins, and considers the difficulties in defining the crime. These difficulties arise from the crime being very widely defined as it includes non-feasance, misfeasance, frauds and deceptions, malfeasance and oppression. It is unclear whether these are separate categories or if they run into one another. It is also unclear if the crime is a conduct crime or whether material damage is required. It appears that the DPP requires material damage before a prosecution can take place. The article argues that as the elements of the crime are so uncertain, it should no longer be prosecuted especially in view of the availability of alternative statutory offences which could be charged instead of the misconduct crime. These statutory offences have the certainty which the misconduct crime lacks and they thus enable public officials to judge their future conduct.

Keywords Non-feasance; Misfeasance; Fraud in office; Malfeasance; Oppression

The crime of misconduct in a public office has a long history as its origins can be traced back to the 13th century.¹ However, modern cases are not inclined to look beyond *R v Bembridge*² where Lord Mansfield CJ's judgment defined the crime as involving two principles:

... first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatever way the officer is appointed . . . Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. That such should be the rule is essential to the existence of the country.³

This definition, in particular 'misbehaviour in his office' indicates this common law crime embraces a wide variety of misconduct and is not easily defined. The essence of the crime is where a person, having a public duty entrusted to him, wilfully neglects to carry out that duty (non-feasance) or wilfully abusing it for some improper motive (misfeasance). The problem with the modern cases is that the crime has been used to prosecute conduct that does not involve actual misconduct in a

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1 See F. Pollock and W. Maitland, *The History of English Law*, 2nd edn, vol. 2 (1898) 520–1.

2 (1783) 3 Doug 327.

3 Ibid. at 332.

public office, but rather conduct that is incidental to the public office.⁴ This article will argue that misconduct in a public office should no longer be prosecuted as its elements are so uncertain and because, in many cases, there are alternative crimes that can be used, for example, the offences of 'active bribery' and 'passive bribery'.⁵

The modern cases on misconduct in a public office

In the 1990s and the first decade of the 21st century there has been a revival in the prosecution of misconduct in a public office.⁶ This revival has its origins in two cases *R v Llewellyn-Jones*⁷ where a county court registrar (now a district judge) used his public office to gain an improper financial advantage by using monies paid into court to fund two mortgage loans in his favour and *R v Dytham*⁸ where a police officer (who was about to go off duty) witnessed a violent fight outside a nightclub but did not intervene and the victim was beaten to death. Both defendants were convicted of misconduct in a public office, and this shows the breadth of the crime. Llewellyn-Jones appealed on the ground that the indictment contained no express allegation of dishonesty, but the appeal was dismissed on the basis that dishonesty was inherent in the offence. On the other hand, Dytham was plainly not dishonest, but he appealed on the ground that the indictment disclosed no offence since misconduct of an officer of justice involved malfeasance or at least a misfeasance involving an element of corruption and not merely non-feasance as alleged in the indictment. His appeal was dismissed, with the Court of Appeal holding that '[t]he allegation made was not of mere non-feasance but of deliberate failure and wilful neglect'.⁹ However, today Llewellyn-Jones could be charged with fraud by abuse of position¹⁰ and Dytham with killing by gross negligence. An omission to act will suffice for gross negligence manslaughter where there is a duty to act. This duty is said to arise where the defendant has a duty of care towards the victim. Dytham owed a duty to preserve the Queen's Peace, so there is surely an argument that he owed a duty of care towards the victim and his omission to act could be regarded as a concurrent cause of the victim's death.

In *Attorney-General's Reference (No. 3 of 2003)*,¹¹ the defendants were police officers who had arrested the victim who had been injured in a fight and had become aggressive and abusive towards the staff at a hospital where he was receiving treatment. Following medical confirmation that the victim was fit enough to be detained, he was placed in

4 J. R. Spencer, 'Policemen Behaving Badly—The Abuse of Misconduct in Office' (2010) 69 Camb LJ 423, case and comment on *R v W* [2010] EWCA Crim 372, [2010] 1 WLR 310, see below.

5 Bribery Act 2010, ss 1 and 2.

6 D. Lusty, 'Misconduct in Public Office' (2009) 173 *Criminal Law & Justice Weekly* 437.

7 [1968] 1 QB 429, CA.

8 [1979] 2 QB 722, CA.

9 *Ibid.* at 727.

10 Fraud Act 2006, s. 4.

11 [2004] EWCA Crim 868, [2005] QB 73.

a semi-face-down position wearing handcuffs in the police station custody suite, but then developed breathing difficulties and died. The officers were charged with gross negligence manslaughter and misconduct in a public office. The latter charges alleged that each defendant 'misconducted himself whilst serving as a police officer, by wilfully failing to take reasonable and proper care of [A], an arrested person in police custody'.¹² The defendants were acquitted on the judge's direction because (i) in respect of the manslaughter charge, there was no causation, as the evidence did not take the case beyond the *de minimis* principle and (ii) there was insufficient evidence of recklessness for a misconduct conviction.¹³ The Attorney-General sought the opinion of the court on the following questions:

(1) What are the ingredients of the common law offence of misconduct in a public office? (2) In particular is it necessary, in proceedings for an offence of misconduct in a public office, for the prosecution to prove 'bad faith' and, if so, what does bad faith mean in this context?¹⁴

The court answered these questions by defining the crime of misconduct in a public office:

The elements of the offence of misconduct in a public office are: (1) a public officer acting as such . . . ; (2) wilfully neglects to perform his duty and/or wilfully misconducts himself . . . ; (3) to such a degree as to amount to an abuse of the public's trust in the office holder . . . ; (4) without reasonable excuse or justification . . .

. . . we do not favour the introduction of the expression 'bad faith' routinely into the summing up to the jury . . . In a case such as the present, for example, the introduction of the doctrine of bad faith, more appropriate to a consideration of commercial dealings, might confuse the jury and deflect them from their task of deciding whether the office of constable had been abused by the conduct of the constables. There may, however, be cases in which the concept of bad faith may be relevant to an assessment of the standard of the defendant's conduct.¹⁵

A number of points can be made about this definition. First, it is clear that the offence of misconduct in a public office is a crime defined by conduct as opposed to results, so that any harmful result only informs the necessary degree of seriousness, which is a question for the jury. This is in contrast to the tort counterpart of this offence, i.e. misfeasance in public office, which requires both conduct and material damage.¹⁶ That said, the misconduct offence was subject to great publicity in 2008 when

¹² Above n. 11 at [1].

¹³ The doctor who said the victim was fit to be detained should have been charged with manslaughter as that confirmation was made without the victim being X-rayed or treated fully for his injuries, which included a punch in the face and a head injury caused by falling over as a result of the punch.

¹⁴ *Attorney-General's Reference (No. 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73 at [2].

¹⁵ *Ibid.* at [61] and [63].

¹⁶ *Three Rivers District Council v Bank of England* [2001] UKHL 16. Misfeasance in public office is the common law's only public law tort because it can only be committed by public officials. See M. I. Aronson 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 *Melbourne University Law Review*.

Christopher Galley a Home Office civil servant, was arrested on suspicion of misconduct in a public office, the allegation being that he had passed confidential and restricted documents to Damian Green, a Tory MP. Mr Green was also arrested on suspicion that he had conspired to commit, and was an accomplice to, the alleged misconduct offence. The DPP, Keir Starmer, decided not to prosecute Galley and Green because, whilst there was damage to the Home Office's arrangements for handling such documents, there needed to be additional damage such as a threat to national security and without that damage there was no realistic prospect of conviction.¹⁷ This indicates that the CPS does require material damage before a prosecution for the crime of misconduct in a public office can be commenced, which means *de facto* the crime and the tort are treated in a similar way.

Secondly, the offence can only be committed by a public officer, that is to say 'an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public'.¹⁸ This covers those who hold a public office, such as police officers, but does it cover employees in private employment who carry out public functions such as those concerned with security at courts and the transport of defendants?¹⁹

Thirdly, the misconduct crime is committed where the public officer wilfully neglects to perform his duty and/or wilfully misconducts himself. Thus, non-feasance and misfeasance are included in the misconduct crime, but also, for the purposes of wilful neglect or misconduct, it is necessary that the defendant has a subjective awareness of the duty to act or a subjective recklessness as to the existence of the duty.²⁰ In addition, the recklessness test will apply to the question whether in particular circumstances a duty arises at all, as well as to the conduct of the defendant if it does.²¹ This is all rather vague and unclear and makes the crime very uncertain for public officials, although in respect of misfeasance the court does endorse the meaning of 'wilful misconduct' given by Webster J in *Graham v Teesdale*,²² namely 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not'.²³ That does show that subjective *mens rea* is required for misfeasance and the same must be true for non-feasance because the defendant must 'have subjective

17 Crown Prosecution Service, 'CPS Advises Metropolitan Police No Prosecution of Damian Green or Christopher Galley', Press Release, 16 April 2009, available at http://www.cps.gov.uk/news/press_releases/122_09/, accessed 24 February 2012. See also D. Lusty, 'Misconduct in Public Office' (2009) 173 JPN 437.

18 *R v Whitaker* [1914] 3 KB 1283 at 1296.

19 Except for bribing a foreign public official this public/private sector division can be put aside when prosecuting for active bribery or passive bribery under ss 1 and 2 of the Bribery Act 2010. See G. R. Sullivan, 'The Bribery Act 2010(1) An Overview' [2011] Crim LR 87.

20 *Attorney-General's Reference (No. 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73 at [30].

21 *Ibid.*

22 (1981) 81 LGR 117.

23 *Ibid.* at 123.

awareness of the duty to act or a subjective recklessness as to the existence of the duty'.²⁴

Fourthly, the non-feasance or misfeasance must be of such a degree as to amount to an abuse of the public's trust in the office holder. The consequences and circumstances of his conduct have to be considered when deciding whether that conduct fell so below the standard of conduct expected so as to constitute the offence.²⁵

... there must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice. The motive with which a public officer acts may be relevant to the decision whether the public's trust is abused by the conduct. As Abbott CJ illustrated in *R v Borron*, a failure to insist upon a high threshold, a failure to confine the test of misconduct as now proposed, would place a constraint upon the conduct of public officers in the proper performance of their duties which would be contrary to the public interest ...

It will normally be necessary to consider the likely consequences of the [misconduct] in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it ... will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer ... There will be some conduct which possesses the criminal quality even if serious consequences are unlikely ...²⁶

So in respect of this element of the crime, gross negligence is required because the threshold of criminal liability is whether the misconduct is so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. It is also clear that any consequence 'is merely one of many potentially relevant factors to be considered whether this test is satisfied'.²⁷ This adds to the complexity of the misconduct offence which supports the argument that it should not be prosecuted because it is insufficiently certain for public officials to judge their future conduct and too complex for lay juries. There are modern less complex statutory offences that may be prosecuted instead such as theft, fraud and bribery.

However, the opinion in *Attorney-General's Reference (No. 3 of 2003)* at least gives a more modern definition of the misconduct offence upon which the courts of first instance could base later decisions. But, in *R v W*²⁸ the Court of Appeal further complicated the law by adding to the definition (i) frauds and deceptions (fraud in office), (ii) wilful excesses of official authority (malfeasance), and (iii) the intentional infliction of

24 *Attorney-General's Reference (No. 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73 at [30].

25 *Ibid.* at [58].

26 *Ibid.* at [56] and [58].

27 D. Lusty, 'Misconduct in Public Office' (2009) 173 JPN 437.

28 [2010] EWCA Crim 372, [2010] 1 WLR 310.

bodily harm, imprisonment, or other injury upon a person (oppression).²⁹ When fraud in office is alleged (such as acquisition of property by theft or fraud), then an essential ingredient of the misconduct offence is evidence that the defendant was dishonest. Presumably dishonesty equates to 'bad faith' referred to in *Attorney-General's Reference (No. 3 of 2003)* and if dishonesty is in issue then, it is assumed, the *Ghosh* test of dishonesty³⁰ will have to be applied which makes the jury's task even more complicated. In respect of malfeasance (an act which is unlawful in itself) and oppression, surely these could be charged as 'ordinary' crimes such as bribery, theft, fraud and assault?

Conclusion

The facts of *R v W* show how the misconduct offence has spread beyond its original purpose of punishing serious non-feasance or misfeasance. W appealed against his conviction for misconduct in a public office. The case against W was that while he was a serving police officer he had wilfully misconducted himself by improperly using a police force credit card, intended only to cover work expenses, to incur expenditure of about £12,500 for personal use funded from public moneys. He admitted that he had used the card for personal use, but said that he did so believing that he was entitled to use it in that way provided that he intended to refund the cost attributable to personal expenditure; he denied that he was guilty of deliberate misconduct or dishonesty. W's appeal was allowed and a retrial ordered because where the crime of misconduct in a public office was committed in circumstances that involved the acquisition of property by theft or fraud (fraud in office), and in particular when the office holder was alleged to have made improper claims for public funds in circumstances that were said to be criminal, an essential ingredient of the offence was proof that he was dishonest, and the directions to the jury omitted that ingredient. But the point is that this was not a case of misconduct in a public office as W's misconduct did not take the form of a breach of, or failure to perform his duties, as a police officer. W should have been charged with theft or, if there had been a false representation, fraud.

This is recognised by Spencer, who states that the misconduct offence 'has a tendency . . . to spread in all directions; and, unless it is kept carefully in check, it will take over anything and everything',³¹ and who believes that this common law offence has no place in the criminal law of the 21st century.³² The misconduct offence is regarded as a very serious offence as it is triable only on indictment and it is punished with a maximum of life imprisonment. The CPS charging guidance³³ recognises this by making it clear that the misconduct offence should only be

²⁹ Above n. 28 at [8].

³⁰ [1982] QB 105, CA.

³¹ Spencer, above n. 4.

³² *Ibid.*

³³ Crown Prosecution Service, 'Misconduct in Public Office', Legal Guidance, available at http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/, accessed 24 February 2012.

used for serious examples of misconduct when there is no appropriate statutory offence that would adequately describe the nature of the misconduct or give the court adequate sentencing powers. The guidance then states:

Misconduct in public office should be considered where:

- there was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;
- there is no suitable statutory offence for a piece of serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offence);
- the facts are so serious that the court's sentencing powers would otherwise be inadequate; or
- it would assist the presentation of the case as a whole (for example, where a co-defendant has been charged with an indictable offence but the statutory offence is summary only and cannot be committed or sent for trial with the co-defendant).

There may be cases in which a number of statutory offences can be more conveniently indicted as a single charge of misconduct in public office in order to make the case easier to present to the court.³⁴

The CPS guidance is to be welcomed as it recognises the potential of the misconduct offence to spread beyond its original purpose. However, the CPS continues to prosecute the misconduct offence when there appears to be a suitable statutory offence. For example, Munir Patel, a court clerk dealing with traffic summons, was charged with one count of active bribery and one count of misconduct in a public offence after he had actively sought bribes for not putting details of penalty points on a court database and thus allowed 53 offenders to escape the proper consequences of their offending. On 18 November 2011 Patel was sentenced to three years' imprisonment for active bribery and six years' imprisonment concurrent for misconduct in a public office.³⁵ Patel could have been charged only with bribery as the maximum punishment for that offence, when convicted on indictment, is 10 years.³⁶

In his commentary to *R v W*, Andrew Ashworth comments '[m]isconduct in a public office is one of those common law offences that cries out for an authoritative restatement, preferably after a thorough examination by the Law Commission'.³⁷ A better CPS policy would be to stop prosecuting the misconduct offence until there has been that authoritative restatement, preferably by Parliament. At present the elements of the misconduct offence are so uncertain that an Article 7 challenge is a definite possibility.

³⁴ Above n. 33.

³⁵ 'Court clerk Munir Patel jailed for taking bribes', BBC News, 18 November 2011, available at <http://www.bbc.co.uk/news/uk-england-london-15689869>, accessed 24 February 2012.

³⁶ Bribery Act 2010, s. 11.

³⁷ [2010] Crim LR 779 at 780.

